No. 624

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

EARLE C. MOODY, et al.,
Appellants,

vs.

RICHMOND M. FLOWERS, et al.,
Appellees.

On Appeal from the District Court of the United States for the Middle District of Alabama.

MOTION TO DISMISS OR AFFIRM.

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Appellees Richmond M. Flowers, Carl E. Sellers, James Herring, W. G. Bond, J. W. Calhoun, W. H. Hicks and W. E. Yance move the Court to dismiss the appeal herein or, in the alternative to affirm the judgment of the District Court for the Middle District of Alabama on the following grounds:

1. The appeal does not present a substantial federal question.

2. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTION PRESENTED.

Whether the United States Constitution requires judicial intervention to compel districting on a population basis of all non-sovereign political subdivisions, including those within a state which are creatures of the legislature, where the legislature itself is apportioned on a population basis?

ARGUMENT.

I.

This Court Has Never Held That Courts Should Impose "the One-Man, One-Vote Rule" Below the Legislative Level, and Certain Recent Holdings of This Court and Statements by This Court Indicate Otherwise.

Prior to **Baker v. Carr**, 369 U. S. 186, this Court had refused to sanction judicial interference with the power of the states to create political subdivisions within various geographical areas. **Colegrove v. Green**, 328 U. S. 549; **MacDougall v. Green**, 335 U. S. 281.

In **Baker v. Carr**, this Court held that the court had jurisdiction to consider a claim that in districting for electing members to the state legislature certain citizens were denied equal protection of the laws in violation of the Fourteenth Amendment. No decision of this Court prior or subsequent to **Baker v. Carr** has held that judicial intervention is appropriate in compelling districting of political subdivisions below the level of the state legislature.

Nothing in **Baker v. Carr** or its progeny suggests that this Court has directed the courts to depart from settled decisions and to intervene and apply "the one-man, one-vote" formula to non-sovereign political subdivisions of a state. Such a task for the judiciary involving tens of thousands of public and quasi-public authorities can not be assumed from any language of this Court in any decision.[1] Appellees submit, therefore, that "the silence" of this Court does not create a substantial federal ques-

[1] In 1960 in the 212 Standard Metropolitan Statistical Areas, covering only about 7% of the areas of the United States, there were an estimated 16,976 "local governments." U. S. Advisory Comm'n on Intergovernmental Relations for Use of House Comm. on Gov't Operations, 87th Cong., 1st Sess., Governmental Structure, Organization, and Planning in Metropolitan Areas 13-14 (Comm. Print 1961).

tion in the area of political subdivisions below the state legislative level.

Moreover, certain language of this Court points clearly to the correctness of the decision below, and to the absence of a substantial federal question. This Court stated in **Reynolds v. Sims**, 377 U. S. 533, 575:

> "Political subdivisions of States—counties, cities, or whatever—never were and never had been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in **Hunter v. City of Pittsburgh**, 207 U. S. 161, 178, these governmental units are 'created as the convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . **and the territory over which they shall be exercised rests in the absolute discretion of the State**'" (Emphasis added).

See also **Tedesco v. Board of Supervisors**, 339 U. S. 940; and **Glass v. Hancock County Comm'n**, 378 U. S. 558.

II.

"One-Man, One-Vote Rule" Is Inapplicable to Alabama Counties.

Appellees point out that even if this Court determined to allow judicial intervention to compel application of "the one-man, one-vote" principle to certain political subdivisions below the state legislative level, such action would be inappropriate for county political subdivisions in Alabama because of the limited power of such county boards of revenue or courts of county commissioners.

In Alabama a county is solely a creature of the sovereign will of the legislature. It has no inherent power

to make laws. **Tuscaloosa County v. Alabama Great So. Ry.**, 227 Ala. 428, 150 So. 328. It has no power and is subject to no duty not originating from the law by which it was created and in which its functions were defined. Whatever power is delegated to it by the state is the power of the state and its nature is not changed by the delegation. **Laney v. Jefferson County**, 249 Ala. 612, 32 So. 2d 542; **Askew v. Hale County**, 54 Ala. 639. Section 44 of the Constitution of Alabama vests legislative power in the legislature, and the constitutional power to make laws may not be delegated to a county or any other agency. **Fox v. McDonald**, 101 Ala. 51, 13 So. 416.

The Alabama legislature of course may delegate "quasi-legislative" powers to the counties. And among such "quasi-legislative" powers, for example, are those involving the general superintendence of public roads, bridges, and ferries within the county. Approximately 85% of the duties of members of the county governing bodies relate to roads. The members inspect the roads, hear complaints and arrange for repairs to the roads. Within a municipality as, for example, the City of Dothan, the task of street maintenance and street supervision is on city officials with the legislature providing the portion of the road tax which must be paid to the municipality. Tit. 12, Sec. 130. With so substantial a part of the duties of the county commissioners relating to roads, it is rational that districts within the county should relate to the roads to be maintained by the county and not primarily to population. Each county commissioner lives within the road district from which he is elected.

A legislature constitutionally composed under the one-man, one-vote rule has not violated the federal constitution by prescribing districts within the counties of Alabama which are based on other considerations than population. As the opinion below makes clear, the county governing body in Alabama lacks even the power to dis-

trict the county. This power resides solely with the legislature, which is a constitutionally apportioned one.

The county can impose only such tax, on such subject, and under such circumstances and within such rate as the legislature authorizes. For example, the type tax available for payment of general county expenses, an ad valorem tax on property, is prescribed by the Alabama Constitution, Section 215, and the maximum rate is then set. Alabama Code, 1940, Tit. 51, Sec. 71, directs the board to levy this tax and for what purposes and when and on what property valuation. Failure of the board to levy could be the subject of mandamus. **Slaughter v. Mobile County, 73 Ala. 134.**

III.

A Properly Apportioned Legislature Has Power to Redistrict Counties Whenever Deemed Advisable.

Finally, this Court has pointed out that a strong motivation for "the one-man, one-vote rule" at the legislative level is the total inability of the state legislatures to correct the long standing abuses of legislative malapportionment. **Reynolds v. Sims,** 377 U. S. 586. No such inability exists with reference to county "governing bodies." The members of the Legislature under **Reynolds v. Sims,** *supra,* are elected in accordance with "the one-man, one-vote" principle. They have the power to redistrict, and the voters have the power to elect legislatures to carry out their wishes relative to county redistricting. A practical political remedy is available, therefore, which was not available when this Court held "the one-man, one-vote" rule applied to state legislatures.

CONCLUSION.

This Court long ago held that courts would not intervene to compel a "one-man, one-vote" rule with reference to political subdivisions. In **Baker v. Carr** and subsequent related cases, this Court carved exceptions

with reference to state legislatures and Congressional districts. It has not, however, indicated any departure from the rule not to intervene with reference to political subdivisions below the legislative level. Strong and apparent differences are present in considering "the one-man, one-vote principle" for state legislatures and for their creatures, county political subdivisions. Particularly is this true in a state such as Alabama where the power for county government is retained to such an overwhelming degree in a properly apportioned state legislature.

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Certificate of Service.

I, Truman Hobbs, one of the attorneys for the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the

31st day of October, 1966, I served copies of the foregoing Motion to Dismiss or Affirm by mailing copies, United States mail, postage prepaid, to:

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